

In The  
Supreme Court of the United States  
October Term, 1989APR 26 1990  
JOSEPH E. SPANION  
CLERK

SCHWEGMANN GIANT SUPER MARKETS,  
DELCHAMPS, INC., THE GREAT ATLANTIC AND  
PACIFIC TEA CO., INC., K&B, INC., NATIONAL  
TEA CO. AND WINN-DIXIE LOUISIANA, INC.,

*Petitioners,*  
VERSUS

BUDDY ROEMER, GOVERNOR OF THE STATE OF  
LOUISIANA, IN HIS OFFICIAL CAPACITY;  
ARNOLD A. BROUSSARD, SECRETARY OF THE  
LOUISIANA DEPARTMENT OF REVENUE AND  
TAXATION, IN HIS OFFICIAL CAPACITY;  
BRUCE N. LYNN, SECRETARY OF THE  
LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND  
CORRECTIONS, IN HIS OFFICIAL CAPACITY;  
AND, LARRY DICKINSON, ASSISTANT SECRETARY  
OF THE LOUISIANA OFFICE OF ALCOHOLIC  
BEVERAGE CONTROL, IN HIS OFFICIAL CAPACITY,

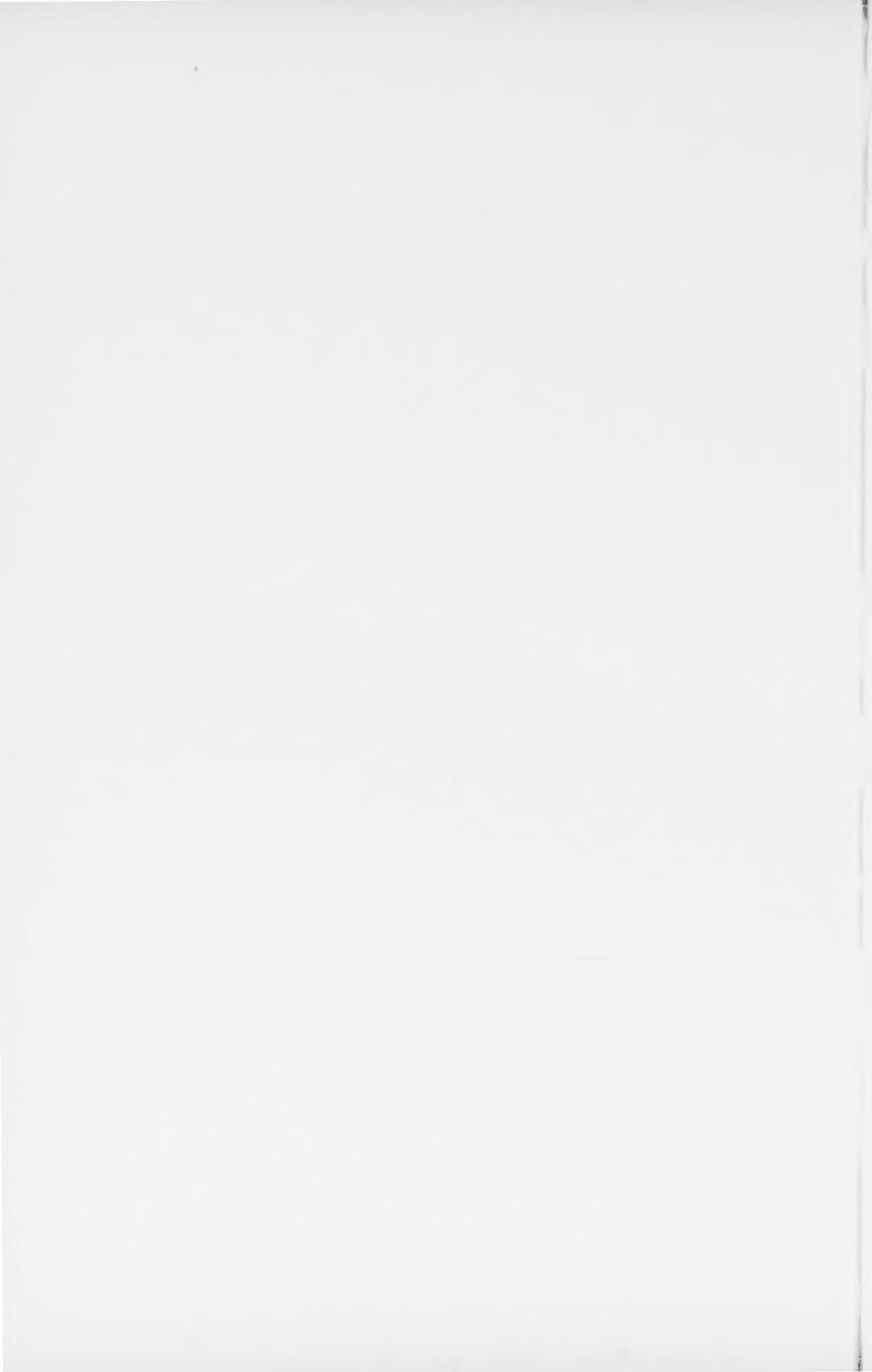
*Respondents.*

On Petition For Certiorari To The  
Louisiana First Circuit Court of Appeal

PETITION FOR CERTIORARI

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## QUESTION PRESENTED

The Louisiana Cash Beer Law mandates and authorizes that private beer wholesalers cannot sell beer on credit to beer retailers. The judgment below upheld this statute from attack on federal constitutional grounds, and presents the following question for review:

1. Under this Court's decisions in *324 Liquor Corp. v. Duffy and Catalano, Inc. v. Target Sales, Inc.*, may a state authorize and mandate private conduct deemed *per se* illegal under the federal antitrust laws without active supervision of the anticompetitive effects of the law or a reexamination of the need for it in light of those effects, or is the law preempted under the Supremacy Clause of the United States Constitution?

## **PARTIES TO THE PROCEEDING**

In addition to the parties listed in the caption of this case, the following are the parent companies, non-wholly-owned subsidiaries, and affiliates of the petitioners:

Schwegmann Giant Super Markets, Inc.

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## OPINIONS BELOW

The opinion of the Louisiana First Circuit Court of Appeal, dated November 19, 1989, is reported at 552 So.2d 1241, and is reprinted as Appendix B. The Judgment of the Nineteenth Judicial District Court for the State of Louisiana is reprinted as Appendix C.

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## JURISDICTION

The petitioners brought this action against the named state officials or their predecessors seeking a declaratory judgment that the Cash Beer Law was unconstitutional, and seeking injunctive relief against the state officials preventing further enforcement of the law. The petitioners contended before the Nineteenth Judicial District Court for the State of Louisiana that the Cash Beer Law was invalid under the Supremacy Clause and under the Due Process and Equal Protection Clauses of the United States Constitution. After a trial on the merits, the district court denied the requested relief by a judgment entered May 24, 1988. See Appendices C-F. On appeal, the Louisiana First Circuit Court of Appeal, without oral argument, affirmed the judgment of the district court, and rendered an opinion joined by two judges of that court dated November 14, 1989. See Appendix B. The decision of the Louisiana First Circuit Court of Appeal upholding the Cash Beer Law over federal constitutional attack became final on January 26, 1990, upon the denial of petitioners' application for review by the Louisiana Supreme Court. See Appendix A. This Petition for Certiorari was docketed within the time prescribed under 28 U.S.C. § 2101.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

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### **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED**

Article VI, Clause 2 of the United States Constitution provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

The Cash Beer Law, codified at La. Rev. Stat. 26:741, provides in relevant part:

All sales of beer and other malt beverages containing more than one-half of one percent alcohol by volume made by wholesalers to retailers shall be for cash only.

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### **STATEMENT OF THE CASE**

Louisiana's Cash Beer Law mandates that beer retailers such as Schwegmann may not purchase beer from beer wholesalers on credit. Accordingly, retailers must

make arrangements with beer wholesalers to pay for beer purchases with cash or its equivalent on the date of delivery. The question presented by this case is whether the Cash Beer Law is unconstitutional under the Supremacy Clause of the United States Constitution.

Because the Cash Beer Law mandates that all beer wholesalers eliminate all credit terms to beer retailers, it mandates private conduct that is considered to be *a per se* violation of the Sherman Act under this Court's decision in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). The Cash Beer Law, therefore, is fundamentally inconsistent with the federal antitrust laws. Under *324 Liquor Corp. v. Duffy*, 479 U.S. 336 (1987), and other relevant authorities of this Court, the Supremacy Clause requires that the Cash Beer Law be preempted as inconsistent with the federal antitrust laws, unless the State can demonstrate that it actively supervises its anticompetitive policy and periodically engages in a pointed reexamination of the need for the State law in light of its deleterious impact on the federal policy of free competition. Louisiana has never engaged in any such active supervision or pointed reexamination.

The petitioners in this action are retail sellers of foods, prescription drugs and other sundry items to the consumers of Louisiana. Beer is among the items that each retailer offers for sale. The Cash Beer Law prohibits retailers such as the petitioners from bargaining for and obtaining normal trade credit terms for their purchases of beer. Louisiana retailers can negotiate for and obtain short-term trade credit on every other commodity they sell. To comply with the Cash Beer Law, however, these

retailers must retain cash on hand to pay for beer deliveries from wholesalers, maintain prepaid cash accounts with wholesalers, or make some other arrangement to pay for the beer on the day it is delivered.<sup>1</sup> Payments need not be made with currency, but all payments must take place prior to or concurrently with each delivery of beer.

In the absence of the Cash Beer Law, credit would be freely available in the market existing between beer wholesalers and retailers. The petitioners' representatives testified that their establishments desired credit and ordinarily obtained it with respect to the purchase of other commodities. A beer wholesaler candidly testified that – if the Cash Beer Law were struck down – credit would

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<sup>1</sup> At trial, representatives of the petitioners explained the various payment methods used to comply with the Cash Beer Law. The Great Atlantic and Pacific Tea Co. ("A&P") and K&B, Inc. ("K&B") pay for beer deliveries with prepurchased money orders. The total weekly amount of money orders used to pay for beer is \$170,000 for A&P and \$300,000 for K&B. Schwegmann Giant Super Markets ("Schwegmann") pays for deliveries at some stores by check and at others by money orders; its weekly beer cost is about \$160,000-\$180,000. Delchamps, Inc. ("Delchamps") maintains prepaid accounts with the beer wholesalers. These accounts total approximately \$600,000. National/Canal Villere maintains cash on hand to pay for deliveries to its stores. The weekly deliveries to National cost approximately \$250,000 per week. [Robert Alford (A&P), Rec. pp. 428-29; Stan Bevis (K&B), Rec. pp. 447-48; Alvin Caillouet (Schwegmann), Rec. pp. 464-65; Roy Henderson (Delchamps), Rec. pp. 439-40; Michael Strachan (National), Rec. pp. 456-57]. (References to the record before the Louisiana First Circuit Court of Appeal are designated as "Rec. p.," followed by the appropriate page number.)

become available in the wholesale/retail beer industry "[j]ust like night and day." [Marriner, Rec. p. 631]. He further testified that, based on information supplied by Anheuser-Busch for wholesale operations, 95 per cent of all wholesale beer sales would be made on credit in the absence of the law. [Alford, Rec. p. 429; Bevis, Rec. p. 449; Caillouet, Rec. pp. 465-66; Henderson, Rec. p. 440; Strachan, Rec. pp. 459; Richard Marriner, Rec. pp. 604-05].

The testimony at trial also established that the Cash Beer Law is anticompetitive. Dr. Pat Culbertson, an expert economist from Louisiana State University, stated that credit is part of the price and is available in virtually every product market. The Cash Beer Law thus operates to preclude one form of price competition among the wholesalers. Wholesalers otherwise could offer credit terms if they chose and could use credit as a means of increasing business and attracting new customers. Dr. Culbertson's study also indicated that the weighted average price of beer in those states having a cash beer law was about ten cents higher per six-pack of beer than in states without such a law.<sup>2</sup> [Culbertson, Rec. pp. 517-19, 522-23].

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<sup>2</sup> Dr. Culbertson testified:

The average price in the noncash beer law states was two dollars and ninety-nine cents per six pack. Three eleven in the cash beer law states; two ninety-nine in the noncash beer law states. . . . [I]n states where you do not have cash beer laws prices are about ten cents lower per six pack.

[Rec. pp. 522-23.]

The beer wholesalers participate actively in the enforcement of the Cash Beer Law. Wholesaler violations ordinarily come to the attention of the Louisiana Alcoholic Beverage Control ("ABC") Office when they are reported by other wholesalers. Forms are provided to the wholesalers to file reports on retailers whose checks are returned. These include the "Wholesale Beer Dealers Daily Report of Retail Dealer Checks Returned Unpaid by the Bank" and a similar monthly report. Further, a form affidavit is provided to wholesalers to report violations of the Cash Beer Law. The enforcement mechanism benefits the wholesalers. Depending on the violation, retailers may be put on a hard currency-only basis or made to pay a fine. In addition, the enforcement procedure requires beer retailers to pay their business debts to the beer wholesalers. [George Brown, Rec. pp. 486-87; Michael Russell, Rec. p. 501; Def. Ex. 7 *in globo*; Def. Ex. 7 (19).]<sup>3</sup>

Wholesalers also implement the enforcement provisions of the Cash Beer regulations. After a second violation by a retailer occurs, the ABC Office issues a public document "TO NOTIFY ALL . . . WHOLESALERS THAT A SECOND VIOLATION HAS OCCURRED ON ACCOUNT OF BEER DEBTS. . . ." [Def. Ex. 7(5)]. The *wholesalers* then refuse to deal with the named retailers on any basis other than to require the payment of hard currency or coin. [*Id.*].

Although the Cash Beer Law is plainly anticompetitive and conflicts with federal antitrust law mandating

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<sup>3</sup> References to exhibits introduced in the trial court record by the respondents are cited as "Def. Ex.," while references to trial exhibits introduced by the petitioners are cited as "Pl. Ex."

free competition, the State of Louisiana does not engage in any program to examine the operation of its anticompetitive policy or to reevaluate its wisdom. Louisiana has never examined the impact of the law on competition or the extent to which the law serves any asserted public purposes, nor has the State acted in any way to review the reasonableness of beer prices. Furthermore, the State does not regularly reevaluate its cash beer policy to determine its wisdom in light of changing economic circumstances. Indeed, no pointed reevaluation of the State policy has ever been conducted.

Mr. George Brown of the Beer Industry League (the trade association for Louisiana beer wholesalers), who was knowledgeable concerning the regulation of the industry and the enforcement of the Cash Beer Law, testified that (1) he knew of no study by any governmental agency to determine the competitive impact of the law and (2) he knew of no examination or reexamination of the Cash Beer Law by the ABC Office. [Brown, Rec. p. 485]. Further, testimony of State officials established that there is no periodic reexamination of the law. Timothy Screen, a former Commissioner of the ABC Board, testified via deposition as follows:

Q. Do you know whether the State, to your knowledge, has conducted any reassessment for need of this law in view of changing market conditions?

A. I don't know that the State has ever done that.

Pl. Ex. 3, p. 17.

Q. Do you know of any studies that have been performed by anyone relating to the impact

of this law in competition in the beer industry?

A. No.

Pl. Ex. 3, p. 20.

Q. Have you ever had to testify before the legislature on the law?

A. No - on the beer cash and liquor credit law?

Q. Yes.

A. No.

Q. Does your office make reports to the legislature about the law?

A. No.

Pl. Ex. 3, pp. 23-24.

Michael Russell, the Commissioner of the ABC Board at the time of trial, confirmed Mr. Screen's testimony. He stated: (1) he knows of no review by the ABC Office of the economic conditions in the beer industry made to determine the need for the Cash Beer Law; (2) he knows of no other agency that has made such a review; (3) there is no procedure he knows of requiring his agency to review the need for the law; (4) he knows of no reexamination of the law conducted by any department of the State; and (5) he has made no reports to the legislature concerning the economic impact of the Cash Beer Law or how this impact balances against any asserted justifications for the law. [Russell, Rec. pp. 503-04].<sup>4</sup>

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<sup>4</sup> Marian Flowers, the administrative director of the ABC Office in charge of supervising the Cash Beer Law, also confirmed the lack of any review of the Cash Beer policy by the State:

(Continued on following page)

The evidence introduced at trial therefore established that the Cash Beer Law mandates and authorizes the elimination of credit in sales from beer wholesalers to retailers; that the elimination of credit is plainly anticompetitive; that the wholesalers actively participate in the enforcement of the law by reporting retailer *and* wholesaler violations and by refusing to deal with certain retailers who violated the law except on a hard currency basis; that the Cash Beer Law serves the economic interests of beer wholesalers at the expense of retailers; and, that the State has never engaged in any reexamination of the need for this law in light of its detrimental impact on free competition.

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(Continued from previous page)

Q. Does the ABC Office ever conduct or review the economic conditions in the beer market to determine the necessity for the cash beer law?

A. As far as I know, nothing like that has ever been done. As far as I'm aware of, I know nothing.

Q. Do you know of any administrative procedure within the ABC Office or any other state office for a review of the beer cash law and its impact on competition in the beer and liquor market?

A. Not that I'm aware of.

Q. Do you know whether the state has ever conducted any sort of reassessment of the need for the cash beer law in view of the changing market conditions?

A. No. I don't know of nothing.

The state trial court heard the evidence and the arguments of counsel. That court then issued a short judgment denying relief to the plaintiff retailers, but did not assign reasons for its judgment. See Appendix C. The retailers appealed the district court's judgment to the Louisiana First Circuit Court of Appeal, which considered the case on the briefs without oral argument. The First Circuit rendered its judgment denying relief on November 14, 1989 in an opinion joined by two judges of that court. See Appendix B. The Supreme Court of Louisiana declined to review the appellate court's judgment. See Appendix A. For the reasons that follow, the petitioners now seek a Writ of Certiorari from this Court.

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#### **REASONS FOR GRANTING THE WRIT**

The record demonstrates that the Louisiana Cash Beer Law is preferential economic legislation for beer wholesalers that authorizes anticompetitive private conduct otherwise forbidden under the federal antitrust laws. The Cash Beer Law, therefore, is preempted under the Supremacy Clause of the United States Constitution because it mandates and authorizes, without active supervision or examination, an anticompetitive practice that is *per se* illegal under the federal antitrust laws.

This Court, in a long line of decisions decided in the context of State regulation of alcoholic beverages, has established a two-part inquiry to determine whether a State law that mandates private anticompetitive activity should be preempted by the Sherman Act. The first inquiry is whether the State law is in direct conflict with the

pro-competitive mandate of the federal antitrust laws. This Court has held that if a State law "mandates or authorizes" an anticompetitive practice that would be considered a *per se* violation of the Sherman Act if agreed to by competitors, it must be considered "inconsistent with the antitrust laws." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 724 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980); *see also Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294 (1982).

If the first inquiry is satisfied, the State law mandating the anticompetitive conduct is preempted by federal law, unless (1) the restraint is part of a clearly articulated State policy, and (2) the State actively supervises the policy and its effects, including a periodic reexamination of the need for the policy. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925 (1980); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980); *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294 (1982).

First, as will be shown below, the elimination of credit terms by beer wholesalers – the very practice mandated by Louisiana's Cash Beer Law – has been held by this Court to be a *per se* violation of the Sherman Act. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925 (1980). Louisiana's Cash Beer Law mandates and authorizes private conduct considered *per se* illegal under the federal antitrust laws, and thus directly conflicts with the Sherman Act. Second, Louisiana has never actively supervised the effects of this law or made, and indeed

has no procedure for making, any pointed reexamination of this law. Accordingly, the Cash Beer Law is preempted and should be declared invalid under the Supremacy Clause.

**A. THE CASH BEER LAW MANDATES AND AUTHORIZES BEER WHOLESALERS TO DENY CREDIT TO RETAILERS, A PRACTICE THIS COURT DEEMED *PER SE* ILLEGAL UNDER THE FEDERAL ANTITRUST LAWS**

The very same practice mandated by the Cash Beer Law was found to be a *per se* violation of the Sherman Act by this Court in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925 (1980). In *Catalano*, the Court held that an agreement by beer wholesalers to sell beer on a cash-only basis, and thereby eliminate short-term trade credit to retailers, was a *per se* violation of the Sherman Act. The Court decided that the agreement to sell beer only if paid for in advance or with cash upon delivery was the equivalent of an agreement to fix prices, which is perhaps the most pernicious of the *per se* violations of the federal antitrust laws. The Court stated:

[U]nder the reasoning of our cases, an agreement among competing wholesalers to refuse to sell unless the retailer makes payment in cash either in advance or upon delivery is "plainly anticompetitive." Since it is merely one form of price-fixing, and since price-fixing agreements have been adjudged to lack any "redeeming virtue," it is conclusively presumed illegal without further examination under the rule of reason.

*Catalano*, 446 U.S. at 650, 100 S.Ct. at 1929. Since the Louisiana Cash Beer Law mandates an anticompetitive

practice that, under *Catalano*, would be considered a *per se* violation of the Sherman Act if agreed to by competitors, it must be considered inconsistent with the antitrust laws. 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 724 (1987).<sup>5</sup>

**B. Because The State Does Not Actively Supervise The Anticompetitive Effects Of The Cash Beer Law Or Reexamine The Need For It, If Any, In Light Of Those Effects, The Statute Is Preempted Under The Supremacy Clause**

Given the *per se* invalidity of a credit-fixing arrangement, the Cash Beer Law is preempted unless the State clearly articulates its policy and actively supervises the effects of its anticompetitive program. This preemption test is applicable whether the State Law mandates or

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<sup>5</sup> The *Catalano* decision controls the issue of the lawfulness, in the antitrust sense, of the activity mandated by Louisiana's Cash Beer Law. The elimination of credit is *per se* illegal under the Sherman Act. In addition, this conclusion is buttressed by the evidence adduced at trial. The testimony established beyond question that credit is freely available to retailers when they purchase virtually all commodities. Except for the Cash Beer Law, which prevents competitive mechanisms from operating, credit would be generally available for wholesale beer sales "just like night and day." [Marriner, Rec. p. 631]. Further, Dr. Culbertson testified that the law is anticompetitive and is a form of price-fixing. [Culbertson, Rec. p. 518]. The wholesalers' expert also conceded that the law eliminates a potentially important competitive tool from the wholesale beer market. [Hair, Rec. p. 726]. Under the reasoning of *Catalano* and the uncontradicted evidence, therefore, the Louisiana Cash Beer Law directly conflicts with the procompetitive mandate of the Sherman Act.

authorizes the anticompetitive conduct. This rule was originally announced by this Court in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980).

In *Midcal*, the State of California required private wholesalers to post resale price schedules and mandated that retailers adhere to these schedules. The Court invalidated the program, holding that, to be immune from Sherman Act preemption under the "state action" exception, the state-imposed restraint "[f]irst, must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Id.* at 105, 100 S.Ct. at 943. The Court determined that the State program failed the second part of the test, even though the State actively *enforced* its scheme, because the need for the anticompetitive program was not reexamined periodically. It said:

The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program.

*Id.* at 105-06, 100 S.Ct. at 943.

In *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294 (1982), another case involving alcoholic beverage control, the Court reviewed the *Midcal* holding and restated the applicable preemption test. The Court upheld the State statute under review, holding that it did not conflict *per se* with the Sherman Act. Nevertheless, in

explaining *Midcal*, the Court made it clear that a State statute mandating private activity that would be a *per se* violation is invalid unless it passes the two-pronged *Midcal* test. The Court described the *Midcal* holding as follows: "We held that the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act." *Id.* at 659-660, 102 S.Ct. at 3299. (Emphasis by the Court). The Court summarized the test as follows:

Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it *mandates* or *authorizes* conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation.

*Id.* at 661, 102 S.Ct. at 3300 (emphasis added).

In a decision issued three years ago – which controls this case – this Court again reaffirmed the *Midcal* test when striking down a New York alcoholic beverage control statute. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720 (1987). In *324 Liquor Corp.*, a New York law mandated that retailers charge prices at least 12 percent greater than the price to the retailer. The statute defined price as the posted bottle price in effect at the time the retailer resells the item. Wholesalers were *required* to file a schedule of bottle prices with the liquor authority, and retailers were *required* to charge at least 12 percent more

than the posted price. 107 S.Ct. at 722 n. 1, 722-23 n. 3. The Court struck down the law, holding that it failed the second prong of the *Midcal* test. It said:

New York "neither establishes prices nor reviews the reasonableness of the price schedules." New York "does not monitor market conditions or engage in any 'pointed reexamination' of the program."

107 S.Ct. at 726.

In invalidating the law in *324 Liquor Corp.*, the Court again reaffirmed that its decision in *Midcal* invalidated a State law because "it mandated resale price maintenance . . . ." 107 S.Ct. at 725, quoting *Rice*. Further, the Court restated the guiding rule: "Our decisions reflect the principle that the federal antitrust laws preempt state laws authorizing or compelling private parties to engage in anti-competitive behavior." 107 S.Ct. at 726 n. 8. (Emphasis added). The opinion of the Louisiana First Circuit Court of Appeal does not even mention this Court's decision in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720 (1987), despite the fact that it was the most recent pronouncement by the Court on the question of preemption of state alcoholic beverage laws. Moreover, the Court of Appeal's opinion cannot be reconciled with *324 Liquor Corp.*'s analysis.

The Court of Appeal mistakenly reasoned that the Cash Beer Law need not be analyzed under the *Midcal* test because it represents action of the state legislature. That reasoning is seriously flawed. Like the Cash Beer Law, State statutes in *Midcal*, *324 Liquor Corp.* and numerous other cases also concerned enactments of state legislatures that mandated anticompetitive conduct, and were

analyzed nonetheless under the two-pronged test of *Midcal*. The Court of Appeal's refusal to review the Cash Beer Law under the *Midcal* tests demonstrates a basic error in its reasoning. Furthermore, it tacitly concedes that the Cash Beer Law would not survive if the tests were applied.

The Court of Appeal refused to apply the *Midcal* and 324 *Liquor Corp.* tests since "they would require discussion only if this Court had found private economic actors or private parties participating or involved in this state regulatory measure. The evidence and the record of this case establishes no private sector involvement." Appendix B, p. 12. This analysis is fundamentally incorrect for two reasons. First, this Court repeatedly has recognized that a State law regulating alcoholic beverages is subject to preemption even though it mandates private anticompetitive conduct and leaves no discretion to private parties. Second, the Cash Beer Law does establish a cooperative pricing system between the State and beer wholesalers, with the State fixing the credit portion of the price and the wholesalers fixing the cash price charged to retailers such as Schwegmann. These points are explained further below.

As stated previously, this Court in 324 *Liquor Corp. v. Duffy* struck down a State law that mandated that retailers charge prices at least 12% greater than the price charged to the retailer by the wholesaler. Obviously, that statute left no discretion to the wholesaler or retailer, since wholesalers were *required* to file a schedule of bottle prices with the liquor authority, and retailers were *required* to charge at least 12% more than the posted price. 107 S.Ct. at 722, n. 1, 722-23, n. 3. Indeed, the Court in 324

*Liquor Corp.* stated that “[o]ur decisions reflect the principle that the federal antitrust laws preempt state laws authorizing or compelling private parties to engage in anti-competitive behavior.” 107 S.Ct. at 726, n. 8. *See also Miller v. Hedlund*, 843 F.2d 1344 (9th Cir. 1987), cert. denied, 108 S.Ct. 1018 (1988) (striking down State liquor law prohibiting discounts and transportation allowances, even though no discretion left to private parties on such terms). The Cash Beer Law, therefore, does not survive preemption merely because it mandates private anticompetitive activity by beer wholesalers.

Furthermore, to the extent that the discretion of private parties may be relevant, the Cash Beer Law provides private beer wholesalers with unsupervised discretion to set the cash term of the price without State review. Although the Cash Beer Law prohibits credit terms, which are an integral element of the price, the beer wholesalers are left with sole and unfettered discretion to set the cash price charged to retailers. In this respect, the Cash Beer Law is directly analogous to the New York law struck down in *324 Liquor Corp.* Noting that the New York law improperly left pricing discretion to private parties, the Court in *324 Liquor Corp.* stated:

New York “neither establishes prices nor reviews the reasonableness of the price schedules.” New York “does not monitor market conditions or engage in any ‘pointed reexamination’ of the program.”

*324 Liquor Corp.*, 107 S.Ct. at 726 (quoting *Midcal*, 100 S.Ct. at 943).

*See also Miller v. Oregon Liquor Control Commission*, 688 F.2d 1222, 1227 (9th Cir. 1982) (State liquor law that did not "provide for government establishment or review of the prices themselves" was not protected by the State action doctrine).

The price terms of beer sales to Louisiana retailers are thus established partially by the State and partially by the beer wholesalers, without any State review of the ultimate price charged to the retailers. Because credit-fixing is tantamount to price-fixing and thus *per se* illegal under the Sherman Act, *see Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925 (1980), the hybrid pricing system established by the Cash Beer Law does nothing more than cast "a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 100 S.Ct. at 943.<sup>6</sup>

As we have pointed out, *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720 (1987); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937 (1980); and *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294 (1982) all hold that a State law mandating

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<sup>6</sup> The Court of Appeal's reliance upon *Fisher v. City of Berkley*, 475 U.S. 260, 106 S.Ct. 1045 (1986) is misplaced. In *Fisher*, the Rent Stabilization Board established the price of rental property affected by the rent control ordinance by setting maximum rent levels. Unlike the Cash Beer Law, the ordinance in *Fisher* "places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board," not the private landlords. 106 S.Ct. at 1051. Under the Cash Beer Law, Louisiana has no procedure to establish or review beer prices charged by wholesalers to beer retailers.

private anticompetitive conduct is subject to preemption.<sup>7</sup> The United States Court of Appeals for the Ninth Circuit reached the same conclusion in circumstances directly analogous to this case in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1018 (1988).

*Miller* was before the Ninth Circuit on two occasions. The plaintiffs attacked a State statute regulating alcoholic beverages that: (1) prohibited discounts, (2) prohibited transportation allowances, (3) required the posting of prices 10 days prior to their effective dates, and (4) required price decreases to remain effective for 180 days in the case of malt beverages, and 30 days in the case of wine. In 1982, the Ninth Circuit held the State law provisions were not protected by the state action doctrine. The court held the "effect of that [state] rule is simply to

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<sup>7</sup> By contrast, the various state court cases cited by the respondents in the courts below did not consider the federal preemption argument presented here. See e.g., *Haskell's Inc. v. Sopsic*, 306 N.W.2d 555 (Minn. 1981); *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission*, 183 Neb. 410, 160 N.W.2d 232 (Neb. 1968); *Sterling Brewers Inc. v. Williamson*, 269 S.W.2d 249 (Ky. 1954); and *Weisberg v. Taylor*, 409 Ill. 384, 100 N.E.2d 748 (Ill. 1951). In addition to failing to consider the preemption argument, other cases relied on by respondents involved beer laws that permitted credit. See *State v. Black Steer Steak House, Inc.*, 102 Wis.2d 534, 307 N.W.2d 328 (Wis. 1981) (permitting up to 30 days trade credit for beer purchases by retailers); *Neel v. Texas Liquor Control Board*, 259 S.W.2d 312, 315-317 (Tex. Civ. App. 1953) (permitting 10-25 days credit for retail beer purchases); and, *James J. Sullivan, Inc. v. Cann's Cabins, Inc.*, 309 Mass. 519, 36 N.E.2d 371, 372 (1941) (permitting up to 90 days credit for retail beer purchases). Cf. also *Castlewood International Corp. v. Wynne*, 294 So.2d 321 (Fla. 1974) (invalidating Florida's cash beer law on equal protection and due process grounds).

effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves." *Miller v. Oregon Liquor Control Com'n*, 688 F.2d 1222, 1227 (9th Cir. 1982). On remand, the district court nonetheless granted summary judgment to the defendants, holding that the state regulations did "not conflict with federal antitrust policy since they only require 'unilateral' action by individual wholesalers, rather than the concerted action necessary for a violation of the Sherman Act." See *Miller*, 813 F.2d at 1347. This argument, which is the same as the argument relied on by the First Circuit Court of Appeal, was flatly rejected by the Ninth Circuit. That court said: "The mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge." *Id.* at 1350-51. Since the scheme would have been an antitrust violation if implemented through private concerted action, the Ninth Circuit concluded that it directly conflicted with the Sherman Act.

In addition, *Miller* rejected the argument that the mandatory nature of the Oregon regulation somehow saved it from preemption. Oregon had mandated certain activities respecting beer and wine sales. The Oregon wholesalers had no discretion to manipulate discounts or allowances, because these practices were prohibited altogether, just as credit for beer sales is altogether prohibited in Louisiana. Similarly, the posting of prices was required, not discretionary. Nevertheless, since Oregon did not monitor market conditions or engage in a pointed reexamination of the program, and since Oregon did not actually displace the entire market mechanism by itself

reviewing and setting liquor prices, the state action doctrine was held inapplicable. 813 F.2d at 1351-52. *Miller* thus disposes of the major contention of the defendants asserted below and adopted by the Louisiana appellate court, *i.e.*, that the mandatory nature of the Cash Beer Law somehow precludes federal preemption.

The regulatory scheme in *Miller* is closely analogous to this case. Here, Louisiana prohibits credit in wholesale beer transactions. There, Oregon prohibited discounts and allowances in wholesale beer transactions and required prices to be posted. In both cases the State prohibited or mandated certain practices by private actors in connection with beer sales, but did not review or establish reasonable prices or conduct a regular, pointed reexamination of conditions in the market. Since the State interfered with the competitive market by mandating a private anticompetitive practice, without altogether supplanting competition or carefully reviewing the need for the anticompetitive practice, the regulation was not protected by the state action doctrine. Thus, *Miller* also establishes that the Cash Beer Law should be preempted.<sup>8</sup>

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<sup>8</sup> In yet another challenge to Oregon alcoholic beverage regulations, the court in *Miller v. Hedlund*, 717 F.Supp. 711 (D. Ore. 1989), reviewed Oregon regulations that mandated the posting of prices, limitations on price changes, and a uniform delivered price for beer and liquor regardless of delivery distance. Like Louisiana's Cash Beer Law, each of these regulations affected one facet of the price while leaving the basic price term to be set by the wholesalers. The district court found that these price restrictions facilitated horizontal price-fixing by wholesalers. The court therefore found that "the challenged features of the rules and regulations of the OLCC

(Continued on following page)

These rulings, all of which involve the economic regulation of alcoholic beverages, establish that State laws are subject to review whether they mandate or authorize private anticompetitive behavior. If the mandatory restraint would constitute a *per se* violation of the federal antitrust laws, the statute is invalid unless (1) the restraint is part of a clearly articulated State policy and (2) the State actively supervises and pointedly reexamines its anticompetitive policy decision. Since *Catalano* held credit-fixing by beer wholesalers to be a *per se* violation of the Sherman Act, the two-pronged test of *Midcal* and *324 Liquor Corp.* must be applied.

As stated earlier, the Louisiana Court of Appeal refused to consider or apply the test. Had it done so, it would have been clear that the Cash Beer Law fails the second prong of the test. In Louisiana, the State does nothing to supervise the anticompetitive effects of the law. Rather, the State cooperates with beer wholesalers to collect their debts and to make sure that beer wholesalers do not deviate from the credit-fixing arrangement.

Louisiana's ABC Office acts in concert with beer wholesalers to enforce the law and to collect bad debts. Wholesalers report retailer violations through their daily

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(Continued from previous page)

constitute 'a substantial impairment of the strong federal interest in favor of competition.' " *Miller*, 717 F.Supp. at 715, quoting from *Miller v. Hedlund*, 813 F.2d 1344, 1352 (9th Cir. 1987). The court further found that none of the asserted justifications for the regulations was necessary to achieve any important state interest, and that the regulations were not immune from attack under the Twenty-First Amendment. The district court entered an injunction enjoining further enforcement of the regulations.

and monthly reports to the ABC Office. Wholesalers also turn in other wholesalers who disregard the credit-fixing program. When retailers are found to have twice violated the law, their names are distributed to all wholesalers, who are required and authorized to refuse to deal with the offending retailers except on a currency or coin basis. The program makes the ABC Office an information clearinghouse and enforcement mechanism for a State-wide wholesaler credit-fixing arrangement. The existence of this State-financed enforcement scheme underscores the bare anticompetitive purpose of the Cash Beer Law. While Louisiana expends no effort to review prices resulting from its anticompetitive policy, it does dedicate resources to ensure *enforcement* of the credit-fixing arrangement, which ironically provides the beer wholesalers with one major element that would otherwise make a private credit-fixing arrangement difficult to maintain.<sup>9</sup>

All the State officials who testified conceded that the State of Louisiana (1) has not made any reexamination of its credit-fixing scheme, (2) has no program for a periodic reexamination of the policy, and (3) does not review competitive conditions in the wholesale beer market or the need for credit-fixing. The record further establishes that the State does not set beer prices or review their

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<sup>9</sup> In a private credit-fixing arrangement by beer wholesalers such as that declared illegal *per se* by this Court in *Catalano*, a participant might be encouraged to secretly grant credit to its customers to gain an increased market share, thus destabilizing the entire credit-fixing arrangement. In Louisiana, that procompetitive channel is foreclosed by State enforcement, thus stabilizing the credit-fixing arrangement.

reasonableness in light of the anticompetitive policy. Louisiana simply enforces the credit-fixing scheme with the help of private wholesalers who unilaterally set the cash portion of the price.

The evidence and authorities establish that the pre-emption doctrine should be applied to invalidate the Cash Beer Law as fundamentally inconsistent with the Sherman Act. The law mandates and authorizes private conduct that otherwise would constitute a *per se* violation of the Sherman Act, and thus directly opposes the federal policy forbidding such plainly anticompetitive trade restraints. The State agency and beer wholesalers work together to set the terms and conditions of beer sales; beer wholesalers set a price that is unreviewed by the State and the State fixes the credit terms by prohibiting them. Though the State lends its sovereign power to the enforcement of this credit-fixing arrangement, its participation stops there. The witnesses most intimately concerned with the Cash Beer Law, including the State officials charged with its enforcement, uniformly testified that the State has never engaged in any pointed reexamination of the need for the law in light of its plainly anticompetitive effects. As this Court declared in *Midcal*, “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.” *Midcal*, 100 S.Ct. at 943. The Cash Beer Law, therefore, is unconstitutional because it is preempted by federal law.

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## CONCLUSION

The question presented for review by this petition is worthy of the Court's attention. Louisiana's Cash Beer Law establishes a credit-fixing arrangement among beer wholesalers having identical anticompetitive effects as the practice found to be *per se* illegal by this Court in *Catalano, Inc. v. Target Sales, Inc.* The opinion of the Louisiana First Circuit Court of Appeal should be reviewed because its holding (i) conflicts with the decisions of this Court in *Midcal* and *324 Liquor Corp.*, both of which require federal preemption of a state alcoholic beverage control statute that mandates plainly anticompetitive conduct without adequate State supervision; and (ii) conflicts with the decision of the Ninth Circuit Court of Appeals in *Miller v. Hedlund*, which holds that a state alcoholic beverage control statute that fixes aspects of the price without reviewing the reasonableness of the price itself is subject to preemption. Accordingly, the Court should grant the petition for a writ of certiorari to the Louisiana First Circuit Court of Appeal.

Respectfully submitted,

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## APPENDIX

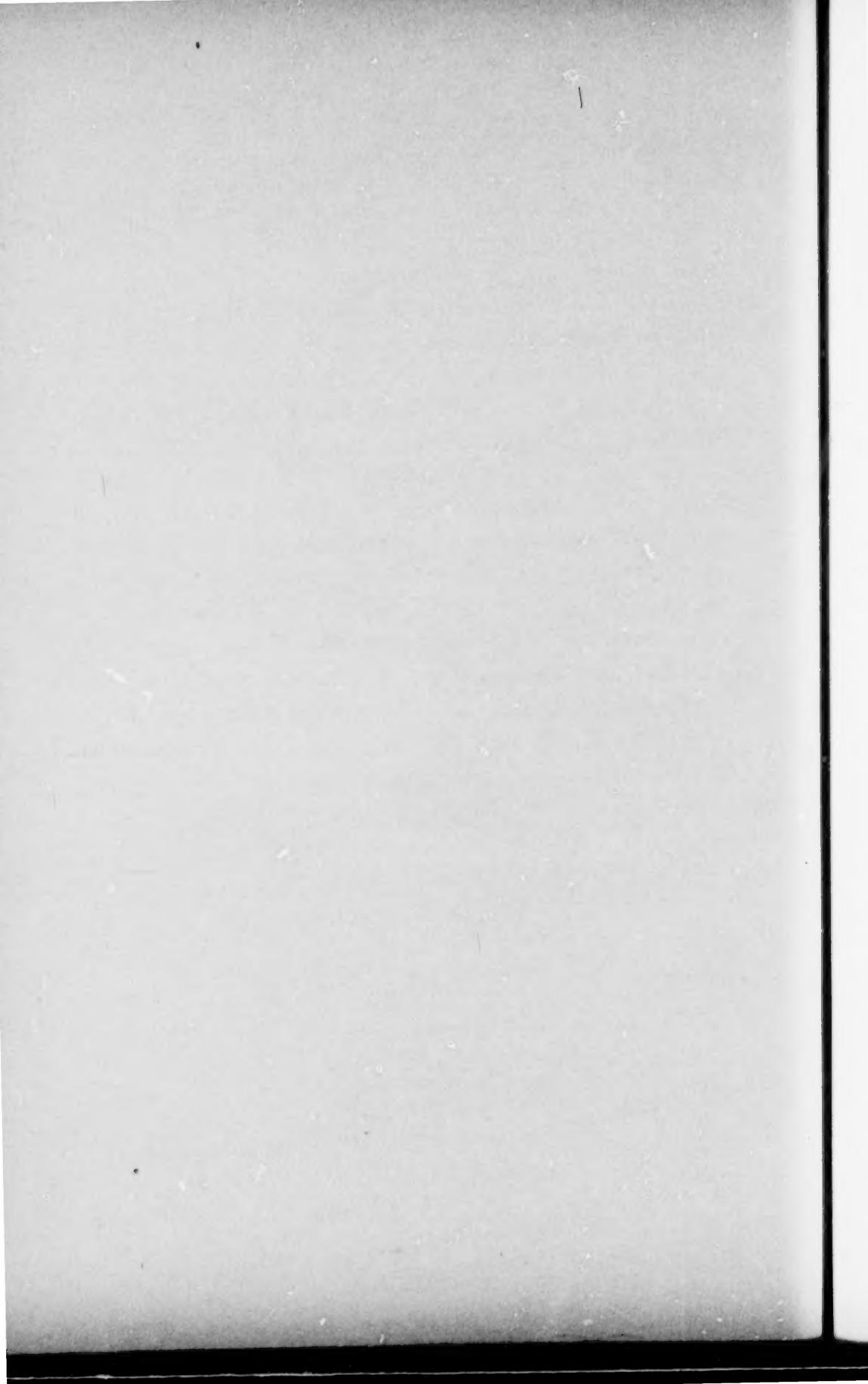


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App. 1

**APPENDIX A**  
**THE SUPREME COURT OF THE**  
**STATE OF LOUISIANA**

**SCHWEGMANN GIANT  
SUPERMARKETS**

**NO. 89-C - 2892**

**VS.**

**EDWIN EDWARDS ET AL**

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IN RE: Schwegmann Giant Supermkt Inc.; - Plaintiff(s);  
Applying for Writ of Certiorari and/or Review; to the  
Court of Appeal, First Circuit, Number CA88 1402; Parish  
of East Baton Rouge Nineteenth Judicial District Court  
Div. "E" Number 223598

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January 26, 1990

Denied.

PFC

JAD

JLD

JCW

HTL

LFC

MARCUS, J., recused.

**Supreme Court of Louisiana**  
January 26, 1990

App. 2

/s/ Illegible  
Deputy Clerk of Court  
For the Court

---

App. 3

**APPENDIX B**  
**STATE OF LOUISIANA**  
**COURT OF APPEAL, FIRST CIRCUIT**  
**Post Office Box 4408**  
**Baton Rouge, Louisiana 70821**

DOCKET NO.: CA/88/1402

DATE: NOV 14, 1989

SCHWEGMANN GIANT SUPER MARKETS  
VERSUS  
EDWIN EDWARDS, ET AL

---

TO: Michael Fontham  
546 Carondelet  
New Orleans, LA 70130  
Camille Gravel, Jr.  
P.O. Box 44071  
Baton Rouge, LA 70804  
David Stewart  
1001 Pennsylvania Ave., N.W.  
Washington, DC 20004

**NOTICE OF JUDGMENT**

You are hereby served with a copy of the opinion in  
the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of  
the Uniform Rules of the Courts of Appeals, effective July  
1, 1982.

I hereby certify that this opinion and notice of judgment  
were mailed to the trial judge, the clerk of the trial court,  
all appeal counsel of record, and all parties not represented  
by counsel this date.

App. 4

/s/ Karen West  
STANLEY P. LEMOINE,  
CLERK  
COURT OF APPEAL,  
FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.  
P. ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EF-  
FECTIVE AUGUST 30, 1986.

SCHWEGMANN GIANT  
SUPER MARKETS  
VERSUS  
EDWIN W. EDWARDS,  
ET AL.

NO. CA 88 1402  
COURT OF APPEAL  
FIRST CIRCUIT  
STATE OF LOUISIANA  
NOV 14 1989

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, IN AND FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, NO. 223,598, HONORABLE DOUG MOREAU, JUDGE.

BEFORE: COVINGTON, C.J., WATKINS & SAVOIE, JJ.  
COVINGTON, C.J.

Plaintiff, Schwegmann Giant Super Markets, operator of numerous supermarkets and retailer of beer, brought this suit for declaratory judgment and injunctive relief against the Governor, the Secretary of the Department of Revenue and Taxation, the Secretary of the Department of Public Safety and the Assistant Secretary, Office of Alcoholic Beverage Control, to have the court declare La. R.S. 26:741, the "Cash Beer Law", unconstitutional and for a permanent injunction enjoining the defendants from enforcing the law and regulations thereunder.

Plaintiff was joined in the suit by intervenors, Delchamps, Inc., Winn-Dixie Louisiana, Inc., National Tea Co., K & B, Incorporated, and The Great Atlantic & Pacific Tea Company, Inc., each of whom sells beer at retail.

The facts show that Schwegmann Giant Super Markets is a commercial partnership domiciled in the Parish of Orleans, appearing herein through one of its partners, Schwegmann Giant Super Markets, Inc., a Louisiana corporation domiciled in the Parish of Orleans; Delchamps,

Inc. is an Alabama corporation licensed to do business in this state, which has its principal business establishment in the Parish of Orleans; Winn-Dixie Louisiana, Inc. is a Florida corporation licensed to do business in this State, which has its principal business establishment in the Parish of Orleans; National Tea Co. is an Illinois corporation licensed to do business in this State, which has its principal business establishment in the Parish of Orleans; K & B, Incorporated is a Louisiana corporation domiciled in the Parish of Orleans, and The Great Atlantic & Pacific Tea Company, Inc. is a Maryland corporation licensed to do business in this State, which has its principal business establishment in the Parish of Orleans.

Plaintiff and intervenors are business establishments which sell goods and commodities at retail in this State. One of the commodities sold by them is beer. The beer that is retailed by them is purchased from wholesale firms which are licensed by the Office of Alcoholic Beverage Control of the State of Louisiana.

The defendants were at the time of the suit officials of this State who had the responsibility for enforcement of the provisions of the Cash Beer Law, and for establishing regulations pursuant thereto. The defendants were sued individually as well as in their official capacities.

The Cash Beer Law requires plaintiffs and intervenors, who are retailers, as well as all retailers of beer, to pay "cash" at the time of purchase from wholesalers, and requires wholesalers to sell beer to retailers "for cash only."

App. 7

La. 26:741 provides:

A. All sales of beer and other malt beverages containing more than one-half of one per cent alcohol by volume made by wholesalers to retailers shall be for cash only.

B. The term "cash" as used in this Section means any consideration consisting of currency, or coin, or check, or certified check, or bank money order, in an amount equalling but not exceeding the purchase price of the beer or other malt beverage delivered. The failure to pay cash upon delivery, or any maneuver, device, or shift of any kind, whereby credit is extended, shall constitute a violation of this Section and subject the license of any violator of this Section to suspension or revocation by the commissioner.

C. The term "check" as used in this Section is an order in writing by a retail beer permittee drawn on, and in accordance with the rules of any bank licensed under the laws of this State, or of the United States of America, ordering said bank to pay a certain sum of money to the beer wholesale permittee making the sale, which check is honored by the bank upon presentation.

D. The commissioner shall promulgate rules and regulations defining terms, specifying conditions by which checks and other cash, as defined in Subsections A and B hereof, may be accepted in payment of beer and other malt beverages and establishing procedures and making requirements to be followed by wholesale dealers in attending hearings, depositing checks, filing reports of checks returned unpaid by the bank, and maintaining records. The violation of such regulations when duly promulgated and enacted may be cause for suspension of

revocation of the violator's license by the commissioner. Any action of the commissioner under this Section providing for suspension or revocation of a permit shall be preceded by a notice to the violator and hearing by the commissioner or his agent.

Acts 1987, No. 696, § 1.

The statute as written is applicable to both seller (wholesaler) and buyer (retailer).

Executives of the plaintiff and of intervenors explained how they respectively paid cash for purchases of beer from the wholesaler. For all of its stores in the New Orleans area, Schwegmann issues one check each day to each wholesaler, and it pays by money order at its other stores. Delchamps maintains a prepaid account with each wholesaler against which invoices are charged. Winn-Dixie has each of its stores pay for beer by a "beer draft." National pays with currency. K & B and A & P pay by money orders issued by each retail location.

After hearing all of the evidence and the arguments of counsel, the trial court rendered judgment in favor of the defendants, denying the relief sought by the plaintiff and intervenors, which has been appealed.

On appeal, the appellants assign the following errors:

#### ASSIGNMENT OF ERRORS

1. The Cash Beer Law directly conflicts with federal law by mandating conduct that is *per se* illegal under the Sherman Act. Because the State does not actively supervise or pointedly reexamine the need for its competitive policy, the district court should have found that the Cash

Beer Law was preempted under the Supremacy Clause of the United States Constitution.

2. The Cash Beer Law bears no rational relationship to any legitimate State objective, and therefore should have been invalidated under the due process and equal protection clauses of the United States and Louisiana Constitutions.

3. The district court should have admitted evidence that the beer wholesalers funded the defense of the Cash Beer Law as relevant to the issues in the case and as affecting the credibility of certain defense witnesses.

First, appellants contend that the Cash Beer Law is inconsistent with the federal anti-trust law (Sherman Act<sup>1</sup>), and it is thus preempted under the Supremacy Clause of the United States Constitution. There is no merit in this contention. It is recognized that state regulatory programs may impose anti-competitive restraints where they bear a rational relationship to a legitimate state objective. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

In *Parker*, the Court found in the Sherman Act no purpose to nullify state powers. The Act is directed against "individual and not state action." Under the program challenged in *Parker*, the State Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Advisory Commission had to approve cooperative policies following public hearings. There was

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<sup>1</sup> 15 U.S.C. sec. 1 et seq.

extensive official oversight. The state created the machinery for establishing the prorate program; it adopted and enforced the prorate program. The Court said: "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." (63 S.Ct. at 313)

The **Parker** Court further observed:

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

(63 S.Ct. at 314)

In **Hoover v. Ronwin**, 466 U.S. 558, 567, 104 S.Ct. 1989, 1995, 80 L.Ed.2d 590 (1984), the Court stated: "when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." The Court went on to say: "Where the conduct at issue is in fact that of the state legislature . . . , we need not address the issues of 'clear articulation' and 'active supervision.' "

**Catalano, Inc. v. Target Sales, Inc.**, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980), cited by appellants, is inapposite to the case at bar. **Catalano** was clearly a

conspiracy among beer wholesalers to restrain trade in violation of the Sherman Act. The wholesalers had entered into a "horizontal agreement" to fix credit (which is equivalent to fixing prices). No state legislation or regulation was involved.

The **Catalano** Court remarked (100 S.Ct. at 1929):

Thus, under the reasoning of our cases, an agreement among competing wholesalers to refuse to sell unless the retailer makes payment in cash either in advance or upon delivery is 'plainly anticompetitive.' Since it is merely one form of price fixing, and since price-fixing agreements have been adjudged to lack any 'redeeming virtue,' it is conclusively presumed illegal without further examination under the rule of reason.

The instant case presents no agreement among competing wholesalers. The action involved is solely state action. The legislature has determined that it is in the state's interest to restrict beer sales from wholesalers to retailers to cash transactions. No private economic actor is granted any degree of private regulatory power. See **Fisher v. City of Berkeley, California**, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986). We find that a horizontal agreement among wholesalers, as in **Catalano** is quite a different matter from the imposition by statute of cash only for purchases of beer by retailers from wholesalers.

Appellants' reliance upon **California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.**, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), is also misplaced. In **California Retail** the state's involvement in the "price-setting program" was insufficient to establish anti-trust immunity under **Parker v. Brown**. Such is not the case in

the instant case. The state plays an active role. The state has total and sole involvement. The wholesalers have no participation or involvement in the determination that beer sales shall be for cash only. In **California Retail** the wine producer held the power to prevent price competition by dictating the prices charged by the wholesalers. In this case the breweries have no power to dictate that beer sales shall be for cash or for credit. The beer wholesalers have no such power. Such determination is solely state action. Thus, the hybrid restraint condemned in **California Retail** is quite different from the state restraint imposed by the Cash Beer Law.

We hold on this issue that the Cash Beer Law is shielded from the Sherman Act by the "state action" doctrine of **Parker v. Brown**. It is plain that the sale of beer for cash only was never intended to operate by force of individual agreement or combination.

We need not consider the other authorities on this issue cited by appellants, since they would require discussion only if this Court had found private economic actors or private parties participating or involved in this state regulatory measure. The evidence in the record of this case establishes no private sector involvement. The evidence does not support appellants' argument that "the Cash Beer Law is designed solely to serve the economic interests of the beer wholesalers." The law serves a valid public interest.

Next, appellants argue that the "Cash Beer Law bears no rational relationship to any State objective, and therefore should have been invalidated under the due process

and equal protection clauses of the United States and Louisiana Constitutions."

It is appellants' position on this issue that the "Cash Beer Law seeks only to insulate beer wholesalers from normal business competition. It bears no real and substantial relation to the public welfare, but is preferential legislation for a certain favored group in the beer industry."

United States Supreme Court precedent holds that state statutes are presumed constitutional even in the absence of any express legislative purpose. "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." **McDonald v. Board of Election Commissioners of Chicago**, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969). Hence, the burden is on the party challenging the statute to "negative every conceivable basis which might support it." **Madden v. Commonwealth of Kentucky**, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940).

#### DUE PROCESS

Under the Due Process Clauses of both the federal and state constitutions<sup>2</sup>, the appellants must overcome the presumption in favor of the validity of the Cash Beer

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<sup>2</sup> U.S. Const. Fifth and Fourteenth Amendments; La. Const. art. I, sec. 2.

Law. See **Theriot v. Terrebonne Parish Police Jury**, 436 So. 2d 515 (La. 1983); **Reynolds v. Louisiana Board of Alcoholic Beverage Control**, 248 La. 639, 181 So. 2d 377(1965), *cert. denied*, 385 U.S. 8 (1966).

In **Theriot**, at 520, the Court stated:

The substantive guarantee of due process in the federal and state constitutions requires only that the legislation have a rational relationship to a legitimate state interest.

In **Reynolds, supra**, the plaintiffs brought a due process challenge to two statutory requirements: (1) that a liquor wholesaler sell to at least 20 per cent of the retailers in its market area, and (2) that more than half of the wholesaler's goods be sold to other retailers and not retained for retail sale by the wholesaler. The Louisiana Supreme Court upheld the statute, observing that it was designed to "stabilize the *wholesale liquor business* and create within the liquor trade *a true class of wholesalers* who are economically stable and financially responsible." 181 So. 2d at 381 (emphasis in original). The Court added (*id.* at 382):

It is hardly necessary to state that an economically stable and financially responsible wholesale liquor business . . . affects the social, moral, and economic welfare of the public. The provisions of the instant statute if enforced will undoubtedly engender stability and responsibility. Therefore, a definite relationship exists between [the statute] and the purpose for which it was enacted.

See **Exxon Corporation v. Governor of Maryland**, 437 U.S. 117, 124-25, 98 S.Ct. 2207, 2213, 57 L.Ed.2d 91 (1978) (due process is not offended by state law excluding

gasoline refiners from ownership of service stations, which, "[r]egardless of [its] ultimate economic efficacy . . . bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market . . ."). See also **New Motor Vehicle Board of California v. Orrin W. Fox Co.**, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978).

The purposes of the Cash Beer Law can better be appreciated in the context of the regulation of alcoholic beverages generally. Alcoholic beverages are treated differently under the law. They are the only commercial product specifically named in the United States Constitution. The State may and does regulate who can buy beer (not minors or intoxicated persons), who can sell beer at the retail level, who can sell beer at the wholesale level, and how close retailers may be located to schools, churches and similar structures. In this context, the Cash Beer Law serves a number of legitimate public goals.

a. *Combatting "Tied-House" Evils* – It is apparent that beer suppliers could gain control of retail outlets, and exclude competitors from those outlets. Wholesaler control of retail outlets could also give rise to the "tied-house" evils<sup>3</sup>. See **Weisberg v. Taylor**, 409 Ill. 384, 100 N.E.2d 748 (1951); **National Distributing Company v. United States Treasury Department**, 626 F.2d 997 (D.C. Cir. 1980). At present, two breweries, Anheuser-Busch and Miller, dominate the beer industry. If the "tied-house" restrictions did not apply and these breweries so desired, they could use credit and other anticompetitive

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<sup>3</sup> "Tied-house" is the imposition by producers or wholesalers of exclusive contracts or agencies upon formerly independent retailers.

tools to exclude competitors from retail outlets. The Cash Beer Law is reasonably related to the state goal of preventing the "tied-house" evils. See **S.A. Discount Liquor, Inc. v. Texas Alcoholic Beverage Commission**, 709 F.2d 291 (5th Cir. 1983) (Texas restriction "prevents companies with monopolistic tendencies from dominating all levels of the alcoholic beverage industry").

b. *Controlling Large Retailers' Market Power* - There is also another side to the "tied-house" problem. Larger retailers could use credit as a lever for extracting concessions from wholesalers, thus gaining advantages over smaller retailers through their market power.

c. *Wholesaler Stability* - Wholesalers are more economically stable and financially responsible if they do not need to extend credit. Credit brings with it higher costs and the threat of bad debt losses, both of which could make the wholesale industry less stable. Stability of the beer market was expressly approved in **Reynolds, *supra***, as a proper state goal.

d. *Retailer Stability* - The Cash Beer Law prevents retailers from becoming over-extended on credit. Hence it aids the stability to retailers in that they cannot get over-extended on credit purchases of beer. Retailer stability is a proper state goal under **Reynolds**.

#### EQUAL PROTECTION

The concept of equal protection of laws is not susceptible to precise definition. There is no easy formula or test applicable; each case must be decided upon its own peculiar circumstances as it arises. See **Puget Sound Power &**

**Light Co. v. King County**, 264 U.S. 22, 44 S.Ct. 261, 264, 68 L.Ed. 541 (1924). Nevertheless, it is generally accepted that the constitutional guarantee of equal protection dictates that no person or class of persons shall be denied the same protection of laws which is accorded other persons or classes of persons in similar circumstances. See **Kentucky Finance Corporation v. Paramount Auto Exchange Corporation**, 262 U.S. 544, 43 S.Ct. 636, 67 L.Ed. 1112 (1923).

However, in applying the equal protection guarantee of the United States Constitution, it has been consistently recognized that the Fourteenth Amendment does not deny to the states the power to treat different classes of persons in different ways. See **Clements v. Fashing**, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). Further, consistent with the equal protection clause, a state may take one step at a time in addressing phases of problems, as long as "the line drawn by the State is rationally supportable." See **Geduldig v. Aiello**, 417 U.S. 484, 495, 94 S.Ct. 2485, 2491, 41 L.Ed.2d 256 (1974). The court said in **Dandridge v. Williams**, 397 U.S. 471, 486, 487, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970), the "Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all."

In **Minnesota v. Clover Leaf Creamery Company**, 449 U.S. 456, 101 S.Ct. 715, 725, 66 L.Ed.2d 659 (1981), the United States Supreme Court severely restricted the grounds on which a statute may be challenged as being underinclusive under the Fourteenth Amendment, as follows:

[A] legislature need not 'strike at all evils at the same time or in the same way,' . . . and that a legislature 'may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.'

(Citations omitted).

In **City of New Orleans v. Dukes**, 427 U.S. 297, 303 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976), the Supreme Court stated:

Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economics under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.

(Citations omitted).

Under federal equal protection analysis, since the statute in question does not concern either a fundamental right or a suspect classification, it may be set aside only if the classification it makes is "based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify [the statute]." See **Clements v. Fashing**, *supra* (102 S.Ct. at 2843).

We find the classification is rational, operating on all retailers and wholesalers of beer alike, and within constitutional requirements. The wholesalers can sell only for cash; the retailers can buy only for cash. It is within the province of the legislature to determine that it does not want anyone engaging in sales of beer to depend on credit for the operation of its business.

We find that, for the foregoing reasons, the Cash Beer Law is rationally related to legitimate state interests. There is no "invidious discrimination" against beer retailers. We hold that the Cash Beer Law is constitutional.

Finally, appellants complain that the trial court erred in refusing to admit evidence that the beer wholesalers funded the defense of the Cash Beer Law. We hold that the trial court properly ruled such evidence inadmissible. It is irrelevant to the supremacy issue or the constitutional issue. Such evidence would have no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." La. Code of Evidence, Art. 401; Pugh, Force, Rault & Triche, Handbook on Louisiana Evidence Law, 204 (1989). "Evidence which is not relevant is not admissible." La. Code of Evidence, Art. 402.

App. 20

For the foregoing reasons, the judgment of the trial court is affirmed at appellants' costs.

AFFIRMED.

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APPENDIX C

NINETEENTH JUDICIAL DISTIRCT [sic] COURT  
PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

NO. 223-598

DIVISION "E"

SCHWEGMANN GIANT SUPER MARKETS  
VERSUS

EDWIN W. EDWARDS ET AL.

FILED: May 24, 1988

/s/ Betty Stewart  
DEPUTY CLERK

JUDGMENT

This case came on for trial pursuant to regular assignment.

After considering the pleadings, evidence adduced and argument of counsel, the court is of the opinion that the plaintiff and all intervenors have failed to prove their demands and, therefore, are not entitled to the relief sought. Accordingly, this suit should be dismissed. Therefore, by reason of the law and evidence being in favor thereof, it is

ORDERRED [sic], ADJUDGED AND DECREED that the demands of plaintiff Schwegmann Giant Super Markets and of intervenors, The Great Atlantic and Pacific Tea Company, Inc., K & B, Incorporated, National Tea Co., Winn-Dixie Louisiana, Inc., and Delchamps, Inc., are hereby dismissed, with prejudice. It is further

ORDERED, ADJUDGED AND DECREED that the defendant and intervenors pay all costs which are hereby assessed equally among them.

App. 22

Rendered on May 5, 1988, read and signed on the 24 day  
of May, 1988.

/s/ DOUG MOREAU  
DOUG MOREAU, JUDGE  
Civil Division "E"  
A TRUE COPY

/s/ Betty Stewart  
DY. CLERK OF COURT

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APPENDIX D

SCHWEGMANN \* NO. 223,598, DIVISION "E"  
GIANT  
SUPER MARKETS \* 19TH JUDICIAL DISTRICT  
VS. COURT  
EDWIN W. \* PARISH OF EAST BATON  
EDWARDS, ROUGE  
ET AL \* STATE OF LOUISIANA

ORDER

IT IS ORDERED that the attached amended minute entry be filed to correct the date of May 3, 1980 which was incorrectly included in the original minute entry filed May 3, 1988.

Done and signed this 5th day of May, 1988.

/s/ Doug Moreau  
DOUG MOREAU, JUDGE  
Civil Division "E"

DM:bs

FILED  
MAY 5 1988

/s/ Betty Stewart  
DY. CLERK OF COURT

A TRUE COPY

/s/ Betty Stewart  
DY. CLERK OF COURT

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**APPENDIX E**

SCHWEGMANN \* NO. 223,598, DIVISION "E"  
GIANT  
SUPER MARKETS \* 19TH JUDICIAL DISTRICT  
VS. COURT  
EDWIN W. \* PARISH OF EAST BATON  
EDWARDS, ROUGE  
ET AL \* STATE OF LOUISIANA

**AMENDED MINUTE ENTRY**

This matter is before the Court on plaintiff Schwegmann Giant Supermarket's petition for: (1) a declaratory judgment that LRS 26:741 is invalid, illegal, and void under the Constitutions of both the United States and the State of Louisiana, and 15 USC 1 et seq.; and (2) a permanent injunction enjoining and restraining defendants from enforcing LRS 26:741 and from enforcing and promulgating rules and regulations thereunder.

Interventions were filed on behalf of The Great Atlantic and Pacific Tea Co., Inc. and K & B, Inc., National Tea Co., Winn-Dixie of Louisiana, Inc. and Delchamps, Inc. joining the plaintiff Schwegmann.

After the taking of evidence, the trial was recessed for review of the evidence prior to oral argument. The case was argued and submitted an [sic] April 27, 1988, after which the Court took the ruling on the merits under advisement for a review of the law in light of the arguments presented.

After reviewing the applicable law and the evidence presented at trial, the Court finds that the plaintiff and

intervenors are not entitled to the relief sought. Therefore, the petitions of plaintiff and intervenors will be dismissed with costs to be assessed equally among them.

Judgment in accord with this minute entry will be signed upon submission. All counsel to be notified by copy of this minute entry.

Done this 5 day of May, 1988.

/s/ Doug Moreau

DOUG MOREAU, JUDGE  
Civil Division "E"

FILED MAY 5 1988

/s/ Betty Stewart

DY. CLERK OF COURT

I hereby certify that on this day a notice of the (illegible) entry was mailed by (illegible) postage affixed to: Messrs. Michael R. Fontham, Camille F. Gravel, Jr., David O. Stewart. Done and signed on May 5, 1988

/s/ Betty Stewart

Deputy Clerk of Court

DM:bs

A TRUE COPY

/s/ Betty Stewart

DY. CLERK OF COURT

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**APPENDIX F**

SCHWEGMANN GIANT SUPER MARKETS VS.	* NO. 223,598, DIVISION "E"
EDWIN W. EDWARDS, ET AL	* 19TH JUDICIAL DISTRICT COURT
	* PARISH OF EAST BATON ROUGE
	* STATE OF LOUISIANA

**MINUTE ENTRY**

This matter is before the Court on plaintiff Schwegmann Giant Supermarket's petition for: (1) a declaratory judgment that LRS 26:741 is invalid, illegal, and void under the Constitutions of both the United States and the State of Louisiana, and 15 USC 1 et seq.; and (2) a permanent injunction enjoining and restraining defendants from enforcing LRS 26:741 and from enforcing and promulgating rules and regulations thereunder.

Interventions were filed on behalf of The Great Atlantic and Pacific Tea Co., Inc. and K & B, Inc., National Tea Co., Winn-Dixie of Louisiana, Inc. and Delchamps, Inc. joining the plaintiff Schwegmann.

After the taking of evidence, the trial was recessed for review of the evidence prior to oral argument. The case was argued and submitted an [sic] April 27, 1988, after which the Court took the ruling on the merits under advisement for a review of the law in light of the arguments presented.

After reviewing the applicable law and the evidence presented at trial, the Court finds that the plaintiff and

intervenors are not entitled to the relief sought. Therefore, the petitions of plaintiff and intervenors will be dismissed with costs to be assessed equally among them.

Judgment in accord with this minute entry will be signed upon submission. All counsel to be notified by copy of this minute entry.

Done this 3rd day of May, 1980.

/s/ Doug Moreau

DOUG MOREAU, JUDGE  
Civil Division "E"

FILED MAY 3 1988

/s/ Betty Stewart

DY. CLERK OF COURT

I hereby certify that on this day a notice of the (illegible) entry was mailed by (illegible) postage affixed to: Messrs. Michael R. Fontham, Camille F. Gravel, Jr., David O. Stewart. Done and signed on May 5, 1988

/s/ Betty Stewart

Deputy Clerk of Court

DM:bs

A TRUE COPY

/s/ Betty Stewart

DY. CLERK OF COURT

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## APPENDIX G

### § 741. Sales of beer and other malt beverages by wholesalers to retailers

A. All sales of beer and other malt beverages containing more than one-half of one per cent alcohol by volume made by wholesalers to retailers shall be for cash only.

B. The term "cash" as used in this Section means any consideration consisting of currency, or coin, or check, or certified check, or bank money order, in an amount equalling but not exceeding the purchase price of beer or other malt beverage delivered. The failure to pay cash upon delivery, or any maneuver, device, or shift of any kind, whereby credit is extended, shall constitute a violation of this Section and subject the license of any violator of this Section to suspension or revocation by the commissioner.

C. The term "check" as used in this Section is an order in writing by a retail beer permittee drawn on, and in accordance with the rules of any bank licensed under the laws of this State, or of the United States of America, ordering said bank to pay a certain sum of money to the beer wholesale permittee making the sale, which check is honored by the bank upon presentation.

D. The commissioner shall promulgate rules and regulations defining terms, specifying conditions by which checks and other cash, as defined in Subsections A and B hereof, may be accepted in payment of beer and other malt beverages and establishing procedures and making requirements to be followed by wholesale dealers in attending hearings, depositing checks, filing reports of checks returned unpaid by the bank, and maintaining

records. The violation of such regulations when duly promulgated and enacted may be cause for suspension or revocation of the violator's license by the commissioner. Any action of the commissioner under this Section providing for suspension or revocation of a permit shall be preceded by a motion to the violator and hearing by the commissioner or his agent.

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